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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

RICHARD REAHARD AND ANN P. REAHARD,

Petitioners,

v.

LEE COUNTY, FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The National Association of Home Builders ("NAHB") has received the written consent of the parties to file this brief as amicus curiae in support of the Petitioner and have filed the letters of consent with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The NAHB represents 180,000 builder and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The NAHB has been before this Court as an amicus curiae in support of the property owner in prior "takings" cases involving governments' land use decisions. Dolan v. City of Tigard, 114 S.Ct. 2309 (1994); Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992); Yee v. City of Escondido, 112 S.Ct. 1522 (1992); Nollan v. California Coastal Commn., 483 U.S. 825 (1987);[1] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, reh'g denied, 478 U.S. 1035 (1986); Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985); San

[1]The NAHB brief was cited approvingly in this Court's Nollan opinion, 483 U.S. at 840.

Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980).

The just compensation clause serves as a vital shield against oppressive governmental land use regulation. It is of paramount importance to this amicus and its members. The actual, as opposed to merely theoretical, availability of an appropriate constitutional remedy for the governmental action that results in a taking is critical to the livelihood of private landowners who either 1) have lost all reasonable economic use of their property solely in order to serve the broader public (i.e., governmental) interests, or 2) are otherwise faced with overreaching governmental requirements that fail to substantially advance legitimate governmental interests. The former type of governmental imposition is presented in this case by Lee County's refusal to allow the Reahards to develop their land within the bounds permitted by law.

Whether the preservation of the Reahards' land as open space is a legitimate or even worthwhile goal is irrelevant.[2] The sole question presented is whether this preservation burden--unquestionably a public benefit--should be shouldered by the Reahards without Lee County providing just compensation.

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[2] Fairness and justice dictate that the public should pay for the cost of the land that is preserved for the benefit of the public, rather than forcing some people alone to bear these public burdens. See Andrus v. Allard, 444 U.S. 51, 65 (1979). "[T]he question at bottom is upon whom the loss ... should fall." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

The NAHB's interest lies in seeing that the law in this field remains consistent, fair, and cognizant of the need to protect the rights of the individual when confronted with well-meaning government officials whose actions to achieve a public good may impinge on constitutional guarantees. As such, it is of paramount importance to the NAHB that property owners maintain the same access to federal courts to enforce their Fifth Amendment rights as they would to enforce a violation of any other part of the United States Constitution.

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

Access to federal courts to enforce Fifth Amendment rights is the primary issue presented in this case. Relying on this Court's decision in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), federal courts have erected barriers to plaintiffs seeking to enforce their Fifth Amendment rights in that forum, requiring that these plaintiffs litigate the matter first in state court. These barriers are contrary to the clear mandate of the United States Constitution, as well as an Act of Congress.[3] Furthermore, these barriers make it increasingly, and unreasonably, difficult for citizens to seek redress of Fifth Amendment violations. This Court's intervention is necessary to correct this situation and to reinstate access to the federal judiciary for the enforcement of the Fifth Amendment.

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[3] 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

A. THE SECOND PRONG OF THE "RIPENESS DOCTRINE" CONFLICTS WITH THE CONSTITUTION, AS WELL AS CONGRESSIONAL AUTHORITY TO ESTABLISH FEDERAL COURTS' JURISDICTION

1. The "Ripeness Doctrine" Disregards Federal Jurisdiction

Federal courts are courts of limited jurisdiction; limited--indeed, established--by the Constitution, as well as Acts of Congress.[4] "The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded."[5] Similarly, it necessarily follows that where the Constitution or an Act of Congress requires the exercise of federal jurisdiction, that mandate also can "be neither disregarded nor evaded." Yet, beginning with

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[4] See Owen Equipment and Erection Co. v. Kroger, 437 U.S. 365, 371-72 (1978)(citing Palmore v. United States, 411 U.S. 389, 401 (1972); Lockerty v. Phillips, 319 U.S. 182, 187 (1943); Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922); Cary v. Curtis, 3 How. 236, 245 (1845)). See also United States Constitution, Article III, Section 2.

[5] Owen Equipment and Erection Co. v. Kroger, 437 U.S. at 374 (emphasis added).

this Court's decision in Williamson County,[6] the latter is exactly how the law concerning the pursuit of federal Fifth Amendment claims has evolved in the federal courts, as plainly evidenced in this case.

The Court in Williamson County established a two prong "ripeness doctrine" for determining when federal courts could assert subject matter jurisdiction over Fifth Amendment claims involving alleged regulatory "takings". A claimant must first obtain a final decision regarding the application of the regulations to the subject property. Then, the claimant must seek compensation through state procedures, including litigation in state courts. Williamson County, 473 U.S. at 186, 194 & 196-97.

The practical effect of the second prong of the "ripeness doctrine" which forces property owners to "seek compensation through [state] procedures", 473 U.S. at 194, including bringing an inverse condemnation action,[7] is that the enforcement of federal Fifth Amendment claims has been delegated to the state courts. This delegation is without either Constitutional or Congressional authority. And, in this case, as well as in many others, this delegation deprives citizens of a federal forum in which to enforce their Fifth Amendment rights.

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[6] Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985).

[7] 473 U.S. at 196.

2. The Eleventh Circuit Refused To Enforce The Reahards' Fifth Amendment Rights

The United States Court of Appeals for the Eleventh Circuit reversed the magistrate judge's finding that Lee County had violated the Reahard's Fifth Amendment rights.[8] Relying on Williamson County, that court reasoned that since the Reahards could pursue their just compensation litigation in Florida state courts, there was no federal subject matter jurisdiction.[9] Circuit Judge Kravitch wrote:

> '[a]s a practical matter, Williamson precludes litigation of the merits of a just compensation claim in federal court unless the state declines to provide adequate procedures through which an aggrieved party might seek compensation.'

Reahard v. Lee County, 30 F.3d at 1417 (citation omitted).[10]

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[8] Reahard v. Lee County, 30 F.3d 1412 (11th Cir. 1994); Reahard v. Lee County, 978 F.2d 1212 (11th Cir. 1992).

[9] Reahard v. Lee County, 30 F.3d 1412, 1417-18 (11th Cir. 1994).

[10] It is important to note that this reasoning is not concerned with whether just compensation has been denied, but whether the state fails to provide a procedure for seeking just compensation. In other words, can a Fifth Amendment right be enforced in state court? The answer is obvious since state courts maintain concurrent jurisdiction over constitutional matters. The issue, however, is must Fifth Amendment rights be enforced in state courts. The answer

This passage reinforced the previous decision written by Circuit Judge Fay in the Addendum to the August 14, 1992 Opinion, Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992):

> Assuming that these claims could be satisfied through adequate state judicial procedures, the Reahards have not stated a ripe federal claim
>
> . . . .

Reahard v. Lee County, 978 F.2d 1212, 1213 (11th Cir. 1992). As argued below, these procedural pronouncements conflict squarely with the federal jurisdictional requirements mandated by the Constitution and by the Congress.

3. Federal Courts Must Hear Cases Brought To Enforce The Fifth Amendment's "Takings Clause"

The Constitution mandates that federal courts hear and consider cases arising under the Fifth Amendment. Article III, Section 2 provides that "[t]he judicial power shall extend to all cases, in law and in equity, arising under this Constitution. . . ." The Congress, consistent with this mandate, enacted 28 U.S.C. § 1331 which provides that

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to that query is clearly no, and it is upon that premise that this decision was wrongly decided and upon which this Court must review its Williamson County decision. The enforcement of Fifth Amendment rights is properly made by a federal court. See United States Constitution, Article III, Sec. 2; 28 U.S.C. § 1331.

"[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Based upon these provisions, there is no merit to the argument that a person asserting a cause of action based on a violation of a right secured by the United States Constitution must first resort to a state forum.[11] Yet that is exactly what the Eleventh Circuit--relying on Williamson County--held in this case.

The federal courts are currently deluged with cases claiming subject matter jurisdiction based upon allegations of violations of the First, Fourth, Eighth, and Fourteenth Amendments of the United States Constitution. There exists no requirement by any authority that claimants bringing causes of actions based upon these portions of the Constitution need first seek compensation in a state forum. When a prisoner alleges that he has been treated by a local sheriff with "cruel and unusual punishment", he is not told to first seek state remedies. The federal courts also do not turn away the Washington Post claiming a First Amendment violation, a homeowner seeking damages for unlawful search and seizure, or a young black girl seeking redress in the face of separate, but unequal school facilities. Yet, for unexplained reasons, the federal courts treat Fifth Amendment claims as unworthy of initial consideration, and have erected procedural roadblocks to litigating Fifth Amendment "takings" claims in the federal courts. This not only contravenes Constitutional and Congressional perogatives, it also defies common sense. As Chief Justice Rehnquist recently wrote:

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[11] Cf. Bell v. Hood, 327 U.S. 678 (1946).

> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of poor relation in these comparable circumstances.

Dolan v. Tigard, 114 S.Ct. 2309, 2320 (1994).

B. THE ELEVENTH CIRCUIT'S DECISION ILLUSTRATES ONE OF THE MANY UNINTENDED CONSEQUENCES OF THE SECOND PRONG OF THE "RIPENESS DOCTRINE"

The current case clearly illustrates one of the several procedural traps created by the second prong of the "ripeness doctrine" enunciated in Williamson County. The Reahards initially brought this case in state court, alleging, inter alia, that Lee County violated their Fifth Amendment rights. Lee County then removed the action to the United States District Court for the Middle District of Florida pursuant to the provisions of 28 U.S.C. §§ 1441 and 1446, based upon the federal Fifth Amendment claims. Then, having lost twice at trial, Lee County raises on appeal, for the first time, the question of "ripeness".[12] In the meanwhile, the Reahards

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[12] It is outrageous that Lee County, having removed the action claiming federal subject matter jurisdiction, could now claim that there never was federal subject matter jurisdiction. Reahard, 30 F.3d at 1415. Unfortunately, this is not an isolated incident, but rather a common governmental tactic

have been seeking redress for the violation of their Fifth Amendment rights for over ten (10) years![13]

Another common "Catch--22" faced by Fifth Amendment plaintiffs are the problems of res judicata and collateral estoppel. If plaintiffs first seek just compensation in state court, they obviously must establish a "taking" as a prerequisite to obtaining just compensation as a remedy. The plaintiff, however, having then litigated these questions in state court and lost, would be forever foreclosed from seeking relief in the federal courts due to the doctrines of res judicata and collateral estoppel. Though the Eleventh Circuit claims to have solved this quandry in Jennings v. Caddo Parish School Bd., 531 F.2d 1331 (5th Cir.), cert. denied, 429 U.S. 897 (1976),[14], it defies logic to require that prior to allowing litigation in one forum, the same claim must be litigated in another forum with concurrent jurisdiction.[15] Moreover, neither Jennings nor Fields address the question of the clear Constitutional and Congressional jurisdictional mandate.

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used to harass, exhaust and defeat property owners trying to assert Fifth Amendment claims.

[13] It is an old and familiar adage that "justice delayed is justice denied."

[14] See also Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299, 1305-06 (11th Cir. 1992)(homeowners' federal takings claims held barred by res judicata).

[15] Especially since a determination of the same operative facts would be required to adjudicate both state and federal claims.

Finally, the second prong of the "ripeness doctrine" runs counter to the intent of the framers of the Constitution. There were two primary reasons for extending federal jurisdiction to cases arising under the Constitution. First, the framers thought that "the judicial power ought to be coextensive with the legislative and executive powers, in order to ensure uniformity of interpretation and operation of the Constitution. . . and the means of enforcing rights, duties, and remedies arising under them."[16] Second, there was concern about pressures being brought to bear upon state courts to rule adversely to litigants seeking to enforce federal rights. Alexander Hamilton wrote in The Federalist, No. 81:

> [T]he most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the states would be improper channels of the judicial authority of the Union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.[17]

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[16] See Joseph Story, A Familiar Exposition of the Constitution of the United States, § 308 (1840).

[17] Professor Story likewise questioned the ability of state courts to rule objectively on matters involving allegations that their sovereign violated the federal law. "No man of sense will believe, that such prohibitions [on the states] would be

The second prong of the "ripeness doctrine" denies Fifth Amendment plaintiffs of the right to have their federal claims enforced in federal forums as envisioned by the framers of the Constitution. Furthermore, even assuming the most objective state forum, there is no compelling reason to consign a plaintiff to seek vindication of a federal right from the forum established by the sovereign entity alleged to have deprived him of that right.

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scrupulously regarded, without some effectual power in the [federal] Government to restrain, or correct infractions of them." A Familiar Exposition of the Constitution of the United States, §312.

CONCLUSION

Access to the federal courts is vital to ensure the protection of federal constitutional rights. This Court should act to provide the same access for plaintiffs asserting violations of the Fifth Amendment that is accorded plaintiffs seeking to enforce other portions of the Constitution. Accordingly, for the reasons stated above and in the Petition for Certiorari, the NAHB prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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